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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 985

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

ESTATE OF FRANCOIS L. CHURCH, DECEASED, EDWARD E. BLACK, EXECUTOR

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR CERTIORARI FILED MAY 20, 1947

CERTIORARI GRANTED JUNE 16, 1947

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 96

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

ESTATE OF FRANCOIS L. CHURCH, DECEASED, EDWARD E. BLACK, EXECUTOR

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

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1 IN THE TAX COURT OF THE UNITED STATES

Docket No. 3489

ESTATE OF FRANCOIS L. CHURCH, DEC'D, EDWARD E. BLACK, EXECUTOR, PETITIONER,

vs.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Appearances: For Taxpayer: Richard E. Dwight, Esq., Wm. W. Owens, Esq., Charles V. Parsell, Esq. For Comm'r: Robert S. Garnett, Esq.

Docket entries

1943

Nov. 23—Petition received and filed. Taxpayer notified. Fee paid.

Nov. 24—Copy of petition served on General Counsel.

Nov. 23—Request for Circuit hearing in New York filed by taxpayer 11/25/43 Granted.

Dec. 29—Answer filed by General Counsel.

1944

Jan. 1—Copy of answer served on taxpayer. New York City.

Mar. 30—Hearing set May 22, 1944, in New York City.

May 22—Hearing had before Judge Arundell on merits. Briefs due 7/6/44. Replies 7/21/44.

Jun. 6—Transcript of hearing 5/22/44 filed.

Jul. 1—Brief filed by taxpayer. Served 7/5/44.

Jul. 5—Memorandum brief filed by General Counsel. Served 7/5/44.

Dec. 5—Memorandum findings of fact and opinion rendered Judge Arundell. Decision will be entered under Rule 50. Copies served 12/6/44.

1945

Jan. 4—Application to introduce additional evidence filed by taxpayer. 1/4/44 Denied.

Jan. 9—Computation of deficiency filed by General Counsel. (No objection.)

Jan. 11—Decision entered. Judge Arundell. Div. 7.

Apr. 4—Petition for review by U. S. Circuit Court of Appeals, 3d Circuit, filed by General Counsel.

Apr. 4—Notice of filing petition for review on Attorney for taxpayer, filed.

Apr. 13—Proof of service on Edward E. Black, Executor, filed.

May 10—Motion for extension of time to 7/3/45 to prepare and transmit the record filed by General Counsel.

May 10—Order enlarging time to 7/3/45 to prepare and transmit record entered.

Jun. 18—Designation of portions of record, proceedings and evidence to be contained in record on review filed by General Counsel with proof of service thereon.

Jun. 18—Statement of points filed by General Counsel with proof of service thereon.

Jun. 18—Designation of additional portions of record filed by taxpayer with proof of service thereon.

* * * * *

15 In the Tax Court of the United States

Docket No. 3489

EST. OF FRANCOIS L. CHURCH, PETITIONER

vs.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Report of proceedings

Filed June 16, 1944

Hearing at New York, N. Y. Date May 22, 1944.

* * * * *

23 E. D. CHURCH, called as a witness on behalf of the Petitioner, being first duly sworn, testified as follows:

* * * * *

31 Q. At the time the decedent established this trust, did he have any brothers and sisters by the whole blood?

A. Yes.

Q. How many?

A. He had one sister and one brother.

32 Q. Did they have any children at that time, Mr. Church?

A. No.

Q. Did the decedent have any children at the time he established the trust?

A. No.

Q. Was he married at that time?

A. No.

Q. How many half brothers and sisters did the decedent have?

A. He had four half brothers.

Q. Did they have any children on May 17, 1924?

A. Yes.

Q. How many children did they have?
A. Seven.
Q. Do you recall the date of the decedent's death?
A. Of the decedent's death?
Q. Yes.
A. It was in December 1939.
Q. At that time did he have any children?
A. No.
Q. Did his brother and sister by the whole blood have any children?
A. Yes.
33 Q. How many?
A. His brother had two and his sister one.
Q. And were that brother and sister themselves alive at the time of the——
A. They were.
Q. At the time of the decedent's death?
A. Yes.
Q. Were the four half brothers of the decedent alive at the time of his death?
A. Yes.
Q. Were the seven children of the four half brothers alive at the time of the decedent's death?
A. Yes.

* * * * *

34 Q. Will you tell us what you said and what he said at that conversation?
A. I called his attention to the fact that for some time he had been, as I put it, squandering money. He had been squandering money and he took up—I took up one specific case where there was a deposit made for his account of $5,000 in the Corn Exchange Bank up on Broadway near 72nd Street. That was put in on March 24th or 26th—24th, I think it was, and it was called to my attention by one of the officers of the Corn Exchange Bank that they felt things were not just as they should be and
35 I saw the withdrawals that had been taken from that account and by April 19, he had checked out over $4,000. A good deal of that was in the shape of cash; some were drawn to his own account and others were drawn to people that I recognized as being dressmakers. There was Saks and Gimbels and also a check drawn to a man that he had become acquainted with which was hardly a reputable person and I noticed that there were several checks or two checks at least that had been drawn to him during that time.
I was—I spoke to him about it and told him that at that rate he certainly was squandering his money and that I knew that he

had been going with a woman of not good reputation, at least, and spending money and giving her money. Also, that he had at times taken too much in the way of drink. You might say, it didn't take much to make him lose his—to know what he was doing. I called his attention to all these things and I also particularly—which I was more interested in than anything else, was to safeguard to whom his stock in the Church & Dwight Co. might evenfually go to. I was somewhat disturbed in the situation as it stood and I told him that the Church & Dwight Co. stock was probably the most valuable asset that he had in
36 his estate and that inasmuch as the stock was very closely held, practically entirely by members of the family—one of the Church family and one of the Dwight family—that I thought it was proper for him to take some steps to safeguard that and suggested that he put that stock in trust.

I might also say right here that he did make it over to me—he wanted to make it over to me, which of course, I wouldn't accept under any conditions and from the office, he went, I presume, to see Mr. Dwight. He had been our attorney for the company and for the family for years and Mr. Dwight drew the Exhibit No. 1.

* * * * *

53 *Petitioner's Exhibit No. 1*

This Indenture made the 17th day of May, 1924, between Francois L. Church, of the Borough of Brooklyn, City and State of New York (hereinafter sometimes called the "Settlor"), party of the first part, and Francois L. Church and E. Dwight Church, of the Borough of Brooklyn, city and State of New York, and Charles T. Church, of New Rochelle, New York (hereinafter sometimes called the "Trustees"), parties of the second part.

Whereas the said Francois L. Church is desirous of making provision for any lawful issue which he may leave at the time of his death as well as provide an income for himself for life in the manner hereinafter set forth,

Now, therefore, the said Francois L. Church, in consideration of the sum of One Dollar to him in hand paid, the receipt whereof is hereby acknowledged, and the acceptance by said parties of the second part of the trust herein declared, has simultaneously with the execution and delivery hereof, sold, assigned, transferred and set over and does hereby sell, assign, transfer and set over unto the said Francois L. Church, E. Dwight Church and Charles T. Church as Trustees, and to their successors, the following securities, to wit:

One thousand (1000) shares of stock of Church & Dwight Co., a corporation organized under the laws of Maine.

To have and to hold the same, together with the moneys and investments into which in the exercise of any power hereinafter given to the trustees or by law vested in them, the
54 said described securities or the proceeds thereof and such moneys may from time to time be converted in trust nevertheless to hold, manage, invest and reinvest the said trust estate upon the trust herein contained and with the powers herein or by law conferred upon the trustees, and to collect and receive the income accruing therefrom and after paying from said income all charges and expenses properly chargeable against the income of said trust estate to pay over the net income to the Settlor, Francois L. Church, during the term of his natural life and upon the death of the Settlor this trust shall cease and determine and the trustees are ordered and directed to transfer and pay over the principal amount of said trust estate, with all increase thereof as it shall then exist, to the child or children of the Settlor then surviving the issue of any deceased child or children to take the share per stirpes which their parent would have been entitled to receive if living.

In the event that the Settlor should die leaving no lawful issue him surviving then and in that event the trustees are ordered and directed to transfer and pay over the principal amount of said trust estate with all increase thereof as it shall then exist in equal shares to the brothers and sisters of the Settlor then surviving, any child or children of a deceased brother or sister to take the share per stirpes which their parent would have been entitled to receive if living.

55 The Trustees with respect to such trust are hereby authorized and empowered:

(1) To retain the trust estate during the continuance of the trust in the same investment in which it was received by them without being liable to account for any resulting loss;

(2) To sell at public or private sale upon such terms and for such price or prices and at such time or times and together or in such lots or parcels as the Trustees may think proper the securities held by them in the trust; but no such sale or sales shall be made by the trustees without the consent first obtained of the Settlor;

Likewise in the event of a sale the proceeds of such sale shall be reinvested by the trustees without unnecessary delay in securities approved by the Settlor or in default of such approval in securities authorized for investment by Trustees by the laws of the State of New York;

(3) To compromise any claim or claims that may at any time arise with reference to the trust estate or any property or security forming a part thereof;

(4). To exchange any of the trust securities for other securities in connection with any reorganization of Church & Dwight Company or any other company or companies issuing securities then belonging to the trust;

56 (5) To vote upon stock, directly or by proxy, in any manner and to the same extent as if the trustees held the shares in their own right, including the power to vote in favor of consolidating or merging corporations into or with each other or into or with other corporations, for the dissolution or liquidation of corporations, the creating or authorization of indebtedness, mortgages and other liens and for the organization or reorganization of corporations and to deposit securities with any reorganization committee or protection committee of any corporation.

(6) To apportion in their uncontrolled discretion as between income and principal as the trustees may deem proper, any losses or profits resulting from the increase or decrease in the value of the securities or property which may at any time form a part of the trust estate, and also so to apportion the income of the trust estate, and any loss in said income and any proceeds received upon account of income, whether by way of interest, dividends, stock dividends or by way of the distribution of cash, bonds, debentures, stocks or other securities by corporations whose stocks or securities may at any time form a part of the principal of the trust estate or otherwise, and also similarly to apportion expenses incurred in the administration of said trust or in connection with the realization upon any of said securities or property;

57 (7) To employ counsel or attorneys at law in connection with the administration of the trust if in their discretion the Trustees deem it necessary or desirable and to pay them reasonable compensation for their services as an expense of the administration of said trust.

In the event that any of the Trustees should resign or for any other reason cease to be a trustee such vacancy shall be filled by the appointment of a successor trustee in writing by the Settlor.

In witness whereof the parties hereto have hereunto set their hands and seals the day and year first above written.

FRANCIS L. CHURCH,
Settlor.

FRANCIS L. CHURCH,
E. DWIGHT CHURCH,
CHARLES T. CHURCH,
Trustees.

70 In the Tax Court of the United States

ESTATE OF FRANCOIS L. CHURCH, DECEASED, EDWARD E. BLACK, EXECUTOR, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Docket No. 3489

Decedent in 1924 established a trust to pay the income to himself for life, and at his death the corpus to be distributed to his surviving issue, or in default thereof, to his brothers and sisters in equal shares, any child or children of a deceased brother or sister to take the share allocated to the parent, per stirpes. Decedent was survived by a brother of the full blood with two children, a sister of the full blood with one child, and four half-brothers with seven children. Held, the corpus of the trust is not includible in the estate of the decedent under section 302 (c) of the Revenue Act of 1926, as amended, as a transfer intended to take effect in possession or enjoyment at or after death.

William W. Owens, Esq., for the petitioner.

Robert S. Garnett, Esq., for the respondent.

Memorandum findings of fact and opinion

December 5, 1944

This proceeding involves a deficiency in estate taxes in the amount of $49,410.30. Three errors were alleged: (1) The inclusion in the gross estate of decedent of the principal of
71 a trust established by him on or about May 17, 1924; (2) the valuation of the principal of the above estate; and (3) the failure of the Commissioner to allow credit for state estate taxes. The second issue has been abandoned by petitioner. As to the third issue the amount of the New Jersey estate tax is dependent upon the outcome of this litigation and counsel have agreed that proof of payment may be submitted upon determination of this proceeding.

FINDINGS OF FACT

Petitioner is the Estate of Francois L. Church, who was at the time of his death, December 11, 1939, a resident of the State of New Jersey. The estate tax return was filed with the Collector of Internal Revenue for the fifth district of New Jersey, on March 10, 1941.

By deed of trust, dated May 17, 1924, decedent transferred to himself, E. Dwight Church, and Charles T. Church, 1,000 shares of stock of Church & Dwight Co., in trust for the purposes and upon the terms hereinafter described. The instrument was executed and delivered in the State of New York, in which state decedent continuously resided until his removal to New Jersey in 1937. E. Dwight Church and Charles T. Church, brothers of the half-blood of decedent, have at all times here material continually resided in the State of New York. The shares constituting the corpus of the trust and the bank account of the trust have been physically located in New York.

At the time of the creation of the trust, decedent had but recently attained his 21st birthday, whereupon there was delivered to him property of substantial value which had theretofore been held and managed for him by his mother. The principal
72 asset of the estate consisted of 1,000 shares of the stock of Church & Dwight Company, a corporation closely held by the Church and Dwight families. In march 1924, it came to the attention of E. Dwight Church that decedent was leading a rather riotous existence, drinking heavily, squandering his money, and associating with companions of questionable repute. Fearful that decedent, as a result of his improvidence, might dispose of the 1,000 shares of Church & Dwight stock to persons outside the family circle, E. Dwight Church suggested to decedent that he place the stock in trust in order to safeguard it and to assure decedent an income for his life. Following this suggestion, decedent established the trust above mentioned. The trust indenture provided that the income should be paid to decedent for life and upon his death the trust should terminate and the corpus be distributed to his issue then surviving. The trust instrument further provided as follows:

"In the event that the Settlor should die leaving no lawful issue him surviving then and in that event the trustees are ordered and directed to transfer and pay over the principal amount of said trust estate, with all increase thereof as it shall then exist in equal shares to the brothers and sisters of the Settlor then surviving, any child or children of a deceased brother or sister to take the share per stirpes which their parent would have entitled to receive if living."

No power to alter, amend, or revoke was reserved by the grantor.

On May 17, 1924, the date of the creation of the trust, decedent had one brother and one sister of the full blood and four half-brothers. On that date there were living seven children of the brothers of the half-blood. Decedent was then unmarried and had no childrens At death he was survived by his brother of the whole blood, who had two children then living; his sister of

the whole blood, who had one child then living; and his four half-brothers, who had seven children then living.

73 The gift in trust was not made in contemplation of death.

Respondent determined that the corpus of the trust was includible in decedent's gross estate as a transfer intended to take effect in possession or enjoyment at or after decedent's death.

OPINION

ARUNDELL, Judge: The only point at issue is whether or not the value of the corpus of this trust is includible in decedent's estate under the provisions of section 302 (c) of the Revenue Act of 1926, as amended, as a transfer "intended to take effect in possession or enjoyment at or after his death." It is clear that the reservation of a right to the income of the trust for life is not a sufficient basis for including the trust corpus in decedent's estate, for the reason that the trust was created prior to the effective date of the Joint Resolution of March 3, 1931, amending section 302 (c) of the Revenue Act of 1926. May v. Heiner, 281 U. S. 238; Hassett v. Welch, 303 U. S. 303; Estate of Edward E. Bradley, 1 T. C. 518, affirmed sub nom. Helvering v. Washington Trust Co., 140 Fed. (2d) 87; Estate of James H. Matthews, 3 T. C. 525.

Respondent relies upon the unglossed principle of Helvering v. Hallock, 309 U. S. 106. We think, however, that this is not a case within the rule of the Hallock case. The trust indenture directed that upon the death of the grantor the corpus was to be distributed to his surviving child or children, or to the issue of any deceased child or children, per stirpes; and in the event the grantor should die without issue surviving, then to his brothers and sisters, or to the child or children of any deceased brother or sister, per stirpes. At the time of his death he

74 had no issue surviving, but there were living his brother with two children, his sister with one child, and his four half-brothers with seven children. Decedent reserved no power to alter, amend, or revoke, nor did he expressly reserve any possibility of reverter. The mere possibility of reverter by operation of law upon a failure of the trust, due to the death of all the remaindermen prior to the death of decedent, is not such a possibility as to come within the Hallock case. Estate of Joseph K. Cass, 3 T. C. 562; Commissioner v. Kellogg, 119 Fed. (2d) 54, affirming 40 B. T. A. 916; Estate of Henry S. Downe, 2 T. C. 967; Estate of Mabel H. Houghton, 2 T. C. 871; Estate of Ellen Portia Conger Goodyear, 2 T. C. 885; Estate of Charles Delany, 1 T. C. 781. (Affirmed without written opinion CCA 2, April 20, 1944.)

Here, as in Commissioner v. Kellogg, supra, "* * * the fact of importance in the case at bar is that the grantor during his

lifetime disposed of his interests in the corpus of the trust as well as any man could." No interest in the property passed from decedent to the remaindermen at his death. His death served merely to "obliterate" the interest possessed by him immediately prior to his death. May v. Heiner, supra; Reinecke v. Northern Trust Co., 278 U. S. 339. It is clear, therefore, that no part of the corpus of the trust is includible in the estate of the decedent as a transfer "intended to take effect in possession or enjoyment at or after his death."

Enter:

Entered December 5, 1944.

Decision will be entered under Rule 50.

75 The Tax Court of the United States

[File Endorsement Omitted.]

[Title omitted.]

Denied. Jan. 4, 1945. (Signed) C. R. Arundell, Judge.

Application to introduce additional evidence

Filed Jan. 4, 1945

To the Honorable Judges of the Tax Court of the United States:

The above proceeding involved an asserted deficiency in federal estate tax. It was tried before this Court, Judge Arundell, presiding, in the city of New York, on May 22, 1944. The only issue raised by the petition was whether a certain trust established by the decedent in 1924 was includible in the gross estate. Under the terms of the trust the decedent was to receive the income for life and the remainder was to go to his issue. On default of issue the remainder was to go to the surviving brothers and sisters of the settlor and to the surviving children of any brother or sister who should predecease settlor. The settlor died in 1939 without issue but leaving sixteen brothers, sisters, nephews, and nieces, ten of whom were younger than the settlor.

76 The respondent's main contention, as outlined in his brief, was that if the settlor had died without issue, brothers, sisters, nephews, or nieces the corpus would, by operation of law, have reverted to his estate and that this possibility of reverter made the trust includible in the gross estate.

The opinion of this Court in favor of petitioner was entered on December 5, 1944. In that opinion the Court held, among other things, that the mere possibility of reverter by operation of law due to the death of all the remaindermen prior to the death

of the settlor was not such a possibility as to come within the Hallock case. As the Court pointed out, this was in accordance with a long line of authority. However, the United States Court of Claims on November 6, 1944, decided Central Hanover Bank & Trust Co. v. United States, 57 F. Supp. 497, which appears to hold that such a remote possibility of reverter by operation of law makes the corpus of a trust includible in the gross estate of the settlor. The respondent, now having a conflict of authority, may be expected to seek to carry the question to the Supreme Court of the United States. Out of an abundance of caution I desire to reopen the proceedings in this case so as to introduce testimony showing that the cash value of this reversion by operation of law was less than one cent, for the Supreme Court
77 might hold that the reversion was taxable and in such event there would be a serious miscarriage of justice if petitioner, because he had failed to prove the value of the reversion, was compelled to include the entire corpus of the trust in the gross estate.

At the close of the trial the trial judge suggested that I might desire to introduce such testimony and I informed him that I had failed to do so because under my interpretation of the previous decisions of this Court it was unnecessary. I did, however, ask for a few days adjournment so that I might bring in an actuary to give such testimony but the Court was unwilling to do this and said it would consider the case as closed. However, the Central Hanover Bank decision has completely altered the complexion of the matter and I therefore ask that the Court now reconsider such application and permit me to introduce the proffered testimony. To show that this application is made in good faith there are annexed hereto the affidavits of E. D. Church and Jonathan G. Sharp showing precisely what such testimony will amount to. Possibly respondent would be willing to concede the accuracy of Mr. Sharp's computations and to permit the receipt of the annexed affidavits in lieu of taking testimony in open Court, for the computations are scarcely matters on which actuaries would disagree. If respondent does not make such concession, however, I am prepared, if the Court will permit me
78 to do so, to make the proof in the usual manner in open court.

Wherefore I respectfully request that the Court reopen these proceedings in order to take testimony concerning the actuarial value of the reversion, if any exists, by operation of law.

William W. Owens,
WILLIAM W. OWENS,
Counsel for Petitioner.

Dated: January 2, 1945.

[Title omitted.]

Affidavit of Jonathan G. Sharp

Jonathan G. Sharp, being duly sworn, deposes and says:

I am a consulting actuary and a member of the firm of Woodward, Ryan, Sharp & Davis who are consulting actuaries located at 41 Park Row, New York City. I studied actuarial science at Toronto University from 1911 to 1914. After the first World War I completed my course and took my degree at that university. Thereafter I became associated with the Metropolitan Life Insurance Company of New York City and was engaged in research work in their Actuarial Department until 1925. I became a fellow of the Actuarial Society of America in 1925 and in 1927 I became a member of the actuarial firm of Woodward, Fodiller & Ryan, the predecessor of my present firm. Upon Mr. Woodward's death in 1928 I was placed in charge of life insurance
80 and general actuarial analysis. I have been head of the firm since that time.

I have advised most of the leading life insurance companies of the United States and a number of private firms and individuals in connection with actuarial matters. Among the clients of our firm, for whom I have done actuarial work, are the New York Life Insurance Company, the Mutual Benefit Life Insurance Company, the Prudential Life Insurance Company and the American Telephone & Telegraph Company. Much of our work for insurance companies if of a research nature devoted to the development of new methods in actuarial work in connection with pensions based upon life expectancies. I have testified as an expert witness in the Tax Court of the United States in actuarial matters on at least two occasions.

I have been asked by Mr. William W. Owens, an attorney of New York City, to assume:

1. That on or about May 7, 1924, Francois L. Church set up a trust to pay the income to himself for life with remainder to his issue but, in default of issue, in equal shares to his brothers and sisters who survived him, with any child or children of a deceased brother or sister to take the share which their parent would have been entitled to receive if surviving him.

81 2. That half brothers of Francois L. Church, and their children, share in the trust to the same extent as whole brothers and their children.

3. That the facts set forth in the annexed affidavit of E. D. Church sworn to January 2, 1945, are correct.

4. That Francois L. Church never had any issue.

5. That the value of the property in the trust on December 11, 1939 was $188,800.

6. That if Francois L. Church had not died on December 11, 1939, the value of the property in the trust would have continued to be $188,800 until the date of his death.

7. That Francois L. Church did not die on December 11, 1939, was in good health on that day and, on that day, had a normal life expectancy.

8. That if Francois L. Church died without issue surviving him and without surviving brothers and sisters and without surviving children of brothers or sisters the corpus of the trust would have constituted part of the estate of Francois L. Church.

On the basis of the foregoing assumptions I have been asked to determine the value as of December 11, 1939,
82 immediately prior to the death of Francois L. Church, of the possibility of the corpus going into his estate by reason of the fact that he would survive the sixteen brothers, sisters, nephews, and nieces mentioned in the annexed affidavit of E. D. Church. In making this computation I have been directed to use the Actuaries' or Combined Table of Mortality with interest at 4% per annum.

I have made the computations and I find that the value, as of December 11, 1939, immediately prior to the death of Francois L. Church, of the possibility of the corpus going into his estate by reason of the fact that he would survive the sixteen brothers, sisters, nephews, and nieces is less than three-ten thousandths of one cent. I have also made a quick computation by the use of other actuarial tables, including (but without thereby limiting the generality of this statement) the American Experience Table and the American Men Table, and I find that regardless of which of those tables I use the value as of December 11, 1939, immediately prior to the death of Francois L. Church, of the possibility of the corpus going into his estate by reason of the fact that he would survive the sixteen brothers, sisters, nephews, and nieces is less than one cent. In all such computations I have assumed that Francois L. Church, instead of dying on December 11, 1939, would live a normal span of life.

83 I am prepared to testify to the foregoing results in this Court under oath and to submit to cross-examination thereon.

JONATHAN G. SHARP,
Fellow of the Actuarial Society of America.

Sworn to before me this 2nd day of January 1945.

George H. Prescott,
[SEAL] GEO. H. PRESCOTT,
Notary Public, Queens County.

Certificate filed in Queens Co. No. 1653. Queens Co. Register's Off. No. 41–P–6. Cert. filed in N. Y. Co. No. 118. Cert. filed in N. Y. Reg. Off. No. 72–P–6. Cert. filed Kings Co. No. 78. Cert. filed Kings Co. Reg. Off. 120–P–6.

Commission Expires March 30, 1946.

84 In the Tax Court of the United States

[Title omitted.]

Affidavit of E. D. Church

E. D. Church, being duly sworn, deposes and says:

I am a half brother of the decedent, Francois L. Church, who died on December 11, 1939. He was born on September 30, 1902. The following brothers, sisters, nephews, and nieces of the whole and half blood survived Francois L. Church:

Name	Relation	Date of birth
James S. Church	Brother	Apr. 27, 1906
2 children	Judith Ann	Jan. 22, 1934
	Susan Louise	Apr. 15, 1937
Nancy Church Turcott	Sister	Feb. 7, 1904
1 child	Nancy Louise	May 31, 1931
Frederic E. Church	Half-brother	Oct. 25, 1876
3 children	Nancy C. Seegers	Mar. 16, 1915
	Charlotte C. Schroeder	Dec. 18, 1902
	Chas. T. Church II	Aug. 24, 1920
85 Charles T. Church	Half-brother	Feb. 17, 1879
No children.		
E. D. Church	Half-brother	Feb. 24, 1907
2 children	Marjory C. Logan	Apr. 30, 1894
	Helen C. Minton	Nov. 19, 1899
Austin Church	Half-brother	Dec. 15, 1871
2 children	Helen C. Towle	Apr. 13, 1904
	Austin Dwight Church	Mar. 20, 1909

E. D. CHURCH.

Sworn to before me this 2nd day of January 1945.

[SEAL] WILLIAM H. BROADHURST,
Notary Public, Suffolk County.

Certificates filed in New York County. Clerk's No. 111. Register's No. 75–B–5.

Commission expires March 30, 1945.

86 In the Tax Court of the United States, Washington

Docket No. 3489

ESTATE OF FRANCOIS L. CHURCH, DECEASED, EDWARD E. BLACK, EXECUTOR, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Decision

Pursuant to the Court's Memorandum Findings of Fact and Opinion entered December 5, 1944; the parties having filed an agreed recomputation of tax on January 9, 1945, it is

Ordered and decided: That there is a deficiency in estate tax of $6,999.38.

Enter:

[SEAL] (S) C. R. ARUNDELL, *Judge.*

Entered Jan. 11, 1945.

Copies served on both parties.

* * * * * *

98 In the United States Circuit Court of Appeals
for the Third Circuit

No. 8993. October Term, 1945

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

ESTATE OF FRANCOIS L. CHURCH, DECEASED, EDWARD E. BLACK, EXECUTOR

Minute entry

Jan. 9, 1946

And afterwards, to wit, 9th day of January 1946, come the parties aforesaid by their counsel aforesaid, and this case being called for argument sur pleadings and briefs, before the Honorable Herbert F. Goodrich, Honorable Gerald McLaughlin, and Honorable John J. O'Connell, Circuit Judges, and the Court not being fully advised in the premises, takes further time for the consideration thereof.

In United States Circuit Court of Appeals for the Third Circuit

[Title omitted.]

Order setting cause for reargument

Filed April 17, 1946

Present: GOODRICH, MCLAUGHLIN, and O'CONNELL, Circuit Judges.

It is hereby ordered that the above entitled case be scheduled for reargument before the Court en banc on Monday, May 6, 1946.

By the Court.

JNO. J. O'CONNELL, *Circuit Judge.*

[File endorsement omitted.]

99 United States Circuit Court of Appeals for the Third Circuit

[Title omitted.]

Amended order

Filed April 24, 1946

Present: GOODRICH, MCLAUGHLIN, and O'CONNELL, Circuit Judges.

The order heretofore entered in the above entitled case scheduling reargument before the court en banc on Monday, May 6, 1946, is hereby revised and amended so as to substitute Friday, May 10, 1946, for Monday, May 6, 1946.

By the Court,

JNO. J. O'CONNELL, *Circuit Judge.*

[File endorsement omitted.]

In the United States Circuit Court of Appeals for the Third Circuit

[Title omitted.]

Minute entry

May 10, 1946

And afterwards, to wit, 10th day of May 1946, come the parties aforesaid by their counsel aforesaid, and this case being called for argument sur pleadings and briefs, before the Honorable John Biggs, Jr., Honorable Albert B. Maris, Honorable Herbert F. Goodrich, Honorable Gerald McLaughlin, and Honorable John J. O'Connell, Circuit Judges, and the Court not being fully advised in the premises, takes further time for the consideration thereof.

And afterwards, to wit, on the 17th day of March 1947, come the parties aforesaid by their counsel aforesaid, and the Court, now being fully advised in the premises, renders the following decision:

100 In United States Circuit Court of Appeals for the Third Circuit

No. 8993. October Term, 1945

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

ESTATE OF FRANCOIS L. CHURCH, DECEASED, EDWARD E. BLACK, EXECUTOR, RESPONDENT

On Petition for Review of the Decision of the Tax Court of the United States

Argued January 9, 1946. Reargued May 10, 1946

Before BIGGS, MARIS, GOODRICH, MCLAUGHLIN, and O'CONNELL, Circuit Judges

Opinion of the court

Filed March 17, 1947

By BIGGS, Circuit Judge: The question presented by the case at bar is whether a transfer of property in trust made by the decedent, Church, in his lifetime is includible in his gross estate for the purpose of imposition of estate tax. See Section 811 (c) of the Internal Revenue Code, 26 U. S. C. A. § 811 (c), Section 302 (c) of the Revenue Act of 1926 as amended, 44 Stat. 70. The trust indenture, executed by Church on May 17, 1924, provided that the income from the trust should be paid to him during life, that on his death the trust should terminate, the corpus to be distributed to his issue then surviving; that in the event he should have no lawful issue surviving the principal amount of the trust with any increment should be paid in equal shares to his brothers and sisters then surviving, any child or children of a deceased brother or sister to take the share per stirpes which the parent would have been entitled to receive if living. No power to amend, alter or revoke the trust was reserved by Church. On the date of the creation of the trust he had one brother and one sister of the full blood and four half-brothers. There were then living seven children of the brothers of the half-blood. Church was then unmarried and had no children. At his death he was survived by his brother of the whole blood who had two children who were then living; by his sister of the whole blood who had one child then living; and by his four half-brothers, who had seven children then living.

101 The Commissioner took the position that the corpus of the trust was includible in the decedent's gross estate. The Tax Court overruled the Commissioner's determination and he appealed.

We think that the decision of the Tax Court must be affirmed. The issue presented seems to be one reserved to the determination of the Tax Court by the decisions of the Supreme Court in Dobson v. Commissioner, 320 U. S. 489; in Wilmington Trust Company v. Helvering, 316 U. S. 164, and in later very pertinent decisions. We cannot "identify a clear-cut mistake of law * * *" in the Tax Court's decision in the case at bar. See the Dobson case supra, at pp. 501–502. In Equitable Life Assurance Society v. Commissioner, 321 U. S. 560, the Supreme Court stated that it was not its task to draw inferences from facts or to supplement stipulated facts, that function resting with the Tax Court. The Supreme Court said that it could modify or reverse the decision of the Tax Court only if that tribunal's determination was "not in accordance with law." Assuredly the function referred to does not lie in this court.

In Commissioner v. Scottish American Co., 323 U. S. 119, 122, the Supreme Court reversed us, stating that the Tax Court drew certain inferences and conclusions which we could not overrule since there was no clear-cut mistake of law. Mr. Justice Murphy laid emphasis upon the validity of factual patterns as found by the Tax Court saying, id at p. 125, "The skilled judgment of the Tax Court, which is the basic fact-finding and inference-making body, should thus be given wide range in such proceedings." In Choate v. Commissioner, 324 U. S. 1, the Supreme Court placed emphasis upon the right of the Tax Court to weigh the legal effect of documentary evidence and in effect admonished the Circuit Courts of Appeals that the legal effect of the transactions as found by the Tax Court generally should not be disturbed. In Trust of Bingham v. Commissioner, 325 U. S. 365, 370–371, it was said that even if "clear-cut questions of law" were presented the Tax Court's decision was entitled to great weight and that reviewing courts may set aside a decision of the Tax Court only when it announces a rule of general applicability which falls short of meeting statutory requirements. In this connection emphasis was laid on the fact that the Tax Court in general decided each case on a particular pattern of circumstances. In Kelley Co. v. Commissioner and Talbot Mills v. Commissioner, 326 U. S. 521, this doctrine seemingly was reiterated.

In the light of the foregoing decisions we think that we may not set aside the finding of the Tax Court in the instant case that "* * * no part of the corpus of the trust is includible in the

estate of the decedent as a transfer 'intended to take effect
102 in possession or enjoyment at or after his death.'" Accordingly the decision of the Tax Court will be affirmed.

Dissenting opinion

O'CONNELL, Circuit Judge, Dissenting.

The basis of the majority opinion is that no clear-cut mistake of law on the part of the Tax Court can be identified; consequently, under the Dobson doctrine, this court is without power to reverse the Tax Court decision. I agree that the review function of this court has been limited to clear-cut mistakes of law; but I respectfully dissent from the pronouncement that the case at bar does not fit that description.

There was no contest as to the facts, nor as to the inferences drawn by the Tax Court. In a trust created prior to March 3, 1931, the decedent reserved a life estate in the income, and, according to the Tax Court, "disposed of his interests in the corpus as well as any man could."[1] The fact remains, however, that, by operation of law, a reversionary interest in favor of decedent did exist.[2] The sole question decided by the Tax Court was whether that reversionary interest brought this case within the principle of May v. Heiner, 281 U. S. 238 (1930), or that of Helvering v. Hallock, 309 U. S. 106 (1940). In short, the issue was: Should an estate tax be imposed on the entire corpus because a reversionary interest created by law was coupled with a life estate? It seems to me that even a cursory reading of the Tax Court opinion establishes that the Tax Court treated this as a pure question of law. Indeed, I consider the conclusion irresistible that the issue could be treated in no other way. As I analyze this case, therefore, it was incumbent upon this court to decide whether the Tax Court correctly decided a purely legal question.

At the outset, it should be noted that the Tax Court disposed of this case before three highly important decisions of the Supreme Court were rendered: Fidelity Co. v. Rothensies, 324 U. S. 108 (1945); Commissioner v. Estate of Field, 324 U. S. 113 (1945); and Goldstone v. United States, 325 U. S. 687 (1945).[3] Although

[1] But see Beach v. Busey, 156 F. 2d 496 (C. C. A. 6, 1946, affirming District Court); cert. den., January 6, 1947. An interesting feature of Beach v. Busey is that, unlike the case at bar, the settlor made a gift over to his "heirs," also designated as "lineal descendants." Clearly, the settlor in that case attempted to dispose of his interest in the corpus. The Supreme Court nevertheless denied certiorari of a decision taxing the corpus of the trust to the settlor, because of the reversionary interest created by operation of law.

[2] Appellee faintly suggests that, under the law of New York, decedent had no reversionary interest. The fundamental rule, however, is that a clear expression of purpose is required to divest the settlor of a reversionary interest, even though the trust is to continue until the death of the reversioner. See Doctor v. Hughes, 225 N. Y. 305, 311 (1919).

[3] The Tax Court decision was entered December 5, 1944, exactly two months before the Fidelity Co. and Field decisions.

those rulings apparently have not changed the position of the Tax Court,[4] they have been the basis of a contrary ruling by
168 four Circuit Courts of Appeals,[5] and constitute the prime reliance of appellant in this case. Consequently, the majority opinion places this court squarely in conflict with the position taken by four other circuit courts.

It seems to me the majority holding is susceptible of only two explanations: either it is felt that, notwithstanding the fact that the question is purely one of law, the Dobson doctrine forbids review unless the error of the Tax Court is beyond doubt; or the majority believes that, on the merits, the Tax Court reached the proper conclusion.

The difficulty I have with the former explanation is that, theoretically at least, once the facts are established there can be only one correct governing principle of law. While the interpretation of the Tax Court may and should be given "great weight" in determining that principle, can it be unequivocally stated that such determination of the legal question by the Tax Court does not warrant appellate scrutiny, where four circuit courts have endorsed a contrary interpretation on virtually identical facts, and the Tax Court itself has decided a similar case in favor of the imposition of the tax?[6]

The second explanation, that the Tax Court was correct on the merits, likewise is subject to penetrating analysis. Such explanation requires strained mental gyrations to remove the instant case from the language of the three Supreme Court decisions.[7] It permits radically different tax results to stem from reversionary interests which are equally remote and unlikely, dependent upon the happenstance of whether or not the settlor ignored the reality that in the eyes of the law he had not released his entire interest in the corpus. It looks away from the fact that decedent, in a formal instrument, has created a trust under the provisions of which an interest retained by him, however remote it may be, is in fact transferred at his death. Finally, it sanctions an extension of the doctrine enunciated in May v. Heiner, supra, which case has been cited by the Supreme Court only twice since Helvering v. Hallock, supra.[8]

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[4] Estate of Edward P. Hughes, 7 T. C. No. 157, promulgated December 16, 1946.

[5] Commissioner v. Bank of California, 155 F. 2d 1 (C. C. A. 9, 1946, reversing Tax Court); Commissioner v. Bayne's Estate, 155 F. 2d 475 (C. C. A. 2, 1946, reversing Tax Court); Beach v. Busey, 156 F. 2d 496 (C. C. A. 6, 1946, affirming District Court), cert. denied, January 6, 1947; Thomas v. Graham, — F. 2d — (C. C. A. 5, decided December 12, 1946, reversing District Court).

[6] Estate of Thomas P. Leaman, 5 T. C. 699 (1945).

[7] See particularly Commissioner v. Estate of Field, 324 U. S. 113 at 116 (1945).

[8] The two occasions were in the concurring opinions of Mr. Justice Douglas in Fidelity Co. v. Rothensies, 324 U. S. 108 (1945), and Commissioner v. Estate of Field, 324 U. S. 113 (1945). He said that the Supreme Court, in those cases, was not required to determine "whether the rule of May v. Heiner should survive Helvering v. Hallock." On the other hand, the Supreme Court has cited Helvering v. Hallock frequently.

It is appropriate at this point to stress that to support the decision of the Tax Court, it must be assumed that May v. Heiner still retains its orginal vigor, and that the Hallock doctrine
104 has not sounded its elegy. It is not my intent to review the volumes which have been written about May v. Heiner. It is sufficient to note that comment has been almost universally adverse;[9] and that, one day after May v. Heiner was cited as controlling decision of three similar cases, the congressional intent was clearly established in an unanimous Joint Resolution specifically imposing an estate tax upon trusts of this nature.

I find no difficulty in applying the Hallock doctrine to this case. We are told that "the statute taxes not merely those interests which are deemed to pass at death according to refined technicalities of the law of property. It also taxes inter vivos transfers that are too much akin to testamentary dispositions not to be subjected to the same excise."[10] We need not concern ourselves with the casuistries of distinctions between contingent and vested remainders subject to divestment,[11] nor with testing the flimsiness of a reversionary string retained by the settlor.[12] In the case at bar, the corpus was to be distributed only to beneficiaries who survived the decedent. Since decedent might survive all designated beneficiaries, there was the possibiltiy that the gift of the corpus would fail, for want of beneficiaries. He did not eliminate this possibility by an unconditional gift over. The string has exactly the same characteristics as though he had expressly reserved it. Why, pragmatically, should not the same legal effect be accorded? Is not the salient conclusion that there existed in the possession of decedent a reversionary interest which, until his death, delayed determination of ultimate possession of the corpus?

The practical effects of the majority opinion, it seems to me, can lead only to further confusion on the scope of the Dobson doctrine. As indicated above, the Tax Court, in Estate of Edward P. Hughes, supra, chose to adhere to its own interpretation of the three Supreme Court decisions. In so doing, the Tax Court specifically rejected the interpretation of the Second Circuit Court. Surely the Dobson doctrine cannot and should not be extended to the anomalous situation where circuit courts must accept Tax Court interpretations of law, even if such interpretations are at variance with their own.

Some controversy exists as to whether the current impasse will be resolved by the Administrative Procedure Act.[13] If the Tax Court

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[9] For an excellent discussion, see Paul, Federal Estate and Gift Taxation, 1946 Supplement, c. 7, § 7.15.
[10] Helvering v. Hallock, 309 U. S. 106, 112 (1940). See also Goldstone v. United States, 325 U. S. 687, 690 (1945).
[11] Helvering v. Hallock, 309 U. S. 106 (1940).
[12] See Fidelity Co. v. Rothensies, 324 U. S. 108 (1945).
[13] P. L. 404, 79th Congress, approved June 11, 1946.

is an "agency," and if it is subject to Section 10 of the Act, the difficulties encountered under the Dobson doctrine will be eliminated; for, under the Act, the appellate jurisdiction of this
105 court is to include not only decision of all relevant questions of law; but also the power to set aside conclusions and findings unsupported by substantial evidence. In any event, it is my opinion that the Dobson doctrine has not so distrained this court as—to borrow a phrase uttered by Judge Frank in a recent dissenting opinion [14]—to bar judicial scrutiny whenever the Tax Court has ceremoniously woosh-wooshed.

For the reasons stated, I believe the decision of the Tax Court should be reversed.

A true Copy:
Teste:

Clerk of the United States Circuit Court of Appeals for the Third Circuit.

In the United States Circuit Court of Appeals for the Third Circuit

No. 8993. October Term, 1945

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

ESTATE OF FRANCOIS L. CHURCH, DECEASED, EDWARD E. BLACK, EXECUTOR

Present: BIGGS, MARIS, GOODRICH, MCLAUGHLIN, and O'CONNELL, Circuit Judges.

Judgment

Filed March 17, 1947

This cause came on to be heard on the transcript of record from the Tax Court of the United States, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed by this Court that the decision of the said Tax Court in this cause be, and the same is hereby affirmed.

By the Court,

BIGGS, *Circuit Judge.*

MARCH 17, 1947.

[14] Old Colony Bondholders v. N. Y., N. H., & H. Railroad Co., — F. 2d — (C. C. A. 2, decided January 13, 1947.

[File endorsement omitted.]

106 [Clerk's certificate to foregoing transcript omitted in printing.]

In the Supreme Court of the United States

[Title omitted.]

Stipulation as to record

Subject to the approval of this Court, it is hereby stipulated and agreed by and between the attorneys for the respective parties hereto, that for the purpose of the petition for a writ of certiorari the printed record may consist of the following:

(1) The appendix to the Petitioner's brief in the United States Circuit Court of Appeals for the Third Circuit.

(2) The appendix to the Respondent's brief in the United States Circuit Court of Appeals for the Third Circuit.

(3) The proceedings had before the United States Circuit Court of Appeals for the Third Circuit.

It is further stipulated and agreed that Petitioner will cause the Clerk of the United States Circuit Court of Appeals for the Third Circuit to file with the Clerk of the Supreme Court the entire transcript of record in his court, and that in the event that the Petition for Writ of Certiorari be granted, the printed record shall consist of the proceedings in the court below, and such
107 portions of the entire transcript of record as the parties may designate.

It is further stipulated and agreed that either of the parties hereto may refer in their briefs to the original record filed in the Supreme Court of the United States.

GEORGE T. WASHINGTON,
Acting Solicitor General of the United States,
Attorney for Petitioner.

WILLIAMS W. OWENS,
Attorney for Respondent.

Dated this 5th day of May 1947.

107 In the Supreme Court of the United States

[Title omitted.]

Stipulation as to printed record

(Filed Aug. 21, 1947)

Subject to this Court's approval, it is hereby stipulated and agreed by and between the attorneys for the respective parties

hereto that, for purposes of the writ of certiorari, the printed record shall consist of the following:

1. Those portions of the transcript of record on file in the office of the clerk of this Court which are contained in the printed transcript of record used for the purposes of the petition for writ of certiorari herein.

2. This stipulation.

It is further agreed that in the briefs for either party reference may be made to any portions of the transcript of record which is not included in the printed record.

GEORGE T. WASHINGTON,
Acting Solicitor General of the United States,
Counsel for Petitioner.
WILLIAM W. OWENS,
Counsel for Respondent.

Dated this 25th day of July 1947.

108 Supreme Court of the United States

Order allowing certiorari

Filed June 16, 1947

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit is granted, and the case is transferred to the summary docket and assigned for argument immediately following No. 1144, Spiegel et al. vs. Commissioner of Internal Revenue.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

U. S. GOVERNMENT PRINTING OFFICE: 1947